Rediehs Interstate, Inc. *and* Fraternal Association of Special Haulers, Petitioner. Case 13-RC-14978

April 20, 1980

DECISION ON REVIEW AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Edward D. Klaeren of the National Labor Relations Board. On September 21, 1979, the Regional Director for Region 13 issued a Decision and Direction of Election, in which he found, *inter alia*, that the single unit owner-operators and drivers of permanently leased trucks who drive for the Employer are employees of the Employer within the meaning of the Act. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision, contending, *inter alia*, that its drivers are independent contractors or employees of independent contractors. By telegraphic order dated November 13, 1979, the National Labor Relations Board granted the Employer's request for review only with respect to the employee status of owner-operators and drivers. Thereafter, the Employer and the Petitioner filed briefs on review.[1]

The Board has considered the entire record with regard to the issue under review, and makes the following findings:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization within the meaning of the Act, and claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Petitioner seeks a unit of owner-operators and drivers of trucks permanently leased to the Employer, contending that these individuals are employees of the Employer within the meaning of Section 2(3) of the Act. The Employer, on the other hand, asserts that these individuals are independent contractors or employees of independent contractors and, therefore, not its employees.

The Employer, a motor carrier, is engaged primarily in hauling steel between northern Indiana and various midwestern, western, and southern States. It contracts to haul goods under authority granted by the Interstate Commerce Commission (ICC) and the State of Indiana. As a motor carrier, it is subject to regulations issued by the ICC, the Federal Highway Administration of the U.S. Department of Transportation (DOT), and the States in which it operates.

The Employer owns no tractors or trailers. In order to perform its contracts to ship goods, the Employer leases approximately 120 tractor/trailer units. Of these, about 60-75 percent are leased from owner-operators, i.e., individuals who own a single unit and also drive it for the Employer. Nearly all of the remaining units are leased from single unit owners who designate another person as the driver.[2] A few units are driven by owners of multiple units.[3]

The relationship between the Employer and its drivers is determined, to a large extent, by rules promulgated by state and Federal agencies, which the Employer is under a legal duty to enforce.[4] Thus, in conformance with Federal regulations, the Employer requires that its drivers successfully complete a rigorous qualification process. It also enforces detailed Federal regulations governing the manner in which the drivers operate their trucks, the condition of the vehicles, and the types of equipment carried on them.

Each applicant for a driving position completes an application form supplied by the Employer. The applicant indicates his or her physical condition and history, driving experience and training, and, for the 3-year period preceding the application, his or her addresses, employment history, and traffic and accident record. The Employer independently confirms the information provided. The applicant must pass a physical examination and a road test, and demonstrate, through a written exam, familiarity with the DOT regulations. In addition, the Employer requires that drivers be at least 21 years old, have a valid driver's license, be able to read and speak English, know how to place and secure cargo safely, and not be disqualified from driving a commercial vehicle by reason of criminal misconduct.[5] Once hired, a driver's qualifications are re-

[1] The Employer also filed a request for oral argument. We hereby deny this request as the record, the request for review, and the briefs adequately present the issues and contentions of the parties.

[2] One driver testified he was hired directly by the Employer to drive a leased unit for a short time. This appears from the record to have been an isolated occurrence.

[3] The Petitioner does not seek to represent those individuals who lease multiple units to the Employer. In addition to driving for the Employer, at least two of these multiple unit owners possess and utilize their own ICC authority as motor carriers.

[4] 49 CFR Sec. 391-Sec. 396.

[5] A driver is disqualified for criminal misconduct, pursuant to 49 CFR Sec. 391.15 (c), if he or she is convicted of one of the following offenses while driving a motor vehicle in furtherance of a commercial enterprise: operating a vehicle while under the influence of alcohol, amphetamines, or narcotics; a crime involving transporting, possessing, or unlawfully using amphetamines or narcotics; a felony involving the use of a motor

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viewed annually by the Employer based on a list of motor vehicle violations submitted by the driver. The Employer also requires each driver to obtain a biennial physical examination.

With regard to the manner in which its drivers perform their duties, the Employer enforces rules prohibiting, *inter alia*, driving while ill, fatigued, or under the influence of alcohol or dangerous drugs; operating a truck within 4 hours of consuming alcohol; transporting unauthorized persons; allowing more than one person in a sleeper berth or transferring to or from a sleeper berth and the cab while the truck is in motion; using an open-flame heater when the truck is in motion; disengaging the vehicle's motive power except to change gears or to stop; operating a vehicle when the presence of carbon monoxide is known, suspected, or likely to occur; and exceeding certain limits on driving time and on-duty time per day and week. In addition, the Employer requires its drivers to adhere to regulations establishing the following affirmative duties. The drivers must insure that the cargo is loaded safely and that the truck is operating properly, inspect the vehicle and load at regular intervals, place red flags on "projecting" loads, wear corrective lenses or a hearing aid if necessary, use turn signals and lights correctly and at designated times, and utilize seat belts if the truck has them. The drivers also must approach railroad crossings at a slow speed and follow detailed emergency procedures when required to stop and/or to leave the vehicle along a road, or if involved in an accident.

These rules are enforced by the Employer primarily through requirements that drivers submit daily time logs provided by the Employer, and report all accidents.[6] The Employer also gives a copy of the regulations to each driver and periodically reminds them of the various rules in writing. The Employer admitted that on occasion it had refused to offer loads to drivers who were late in turning in their logs. According to Renner, a former secretary, the Employer has also refused to issue settlement checks, i.e., checks issued each week in payment for the driver's work, or assign loads due to drivers' delays in filing logs or their failure to obtain biennial physical examinations. In addition, one driver indicated the Employer had refused to allow him to drive during a period when he was ill. Although the Employer presented testimony that it did not enforce its rules by terminating leases or threatening to terminate leases, one driver testified that he had been terminated because he was late in submitting his logs. Further, the Employer has sent notices to its drivers threatening termination of drivers who carried passengers in their trucks or who did not present their trucks for loading during a driver's strike in late 1978.

The Employer requires that the trucks it leases conform to very detailed specifications with regard to the following: lamps and reflectors, turn signals, service, parking and emergency brakes, windows, fuel systems, coupling devices, tires, sleeper berths, heaters, wipers, defrosters, mirrors, horns, speedometers, exhaust systems, floors, seat belts, rear end protection, and emergecy equipment. In addition, the Employer enforces maximum allowable noise levels within the truck cabs. To assure compliance with these rules, an agent of the Employer inspects the drivers' trucks approximately once per month. The Employer will refuse to load trucks which fail to pass this inspection. Also, the drivers must complete a daily vehicle condition statement which appears on their daily log form.

The relationship between the Employer and its drivers is further defined by a "contractor's agreement," which is drafted by the Employer to meet certain requirements established by Federal regulations,[7] and is not subject to negotiation by drivers in the proposed unit. According to the agreement, the "contractor," an owner of a tractor and/or trailer unit, leases the equipment exclusively[8] to the Employer, and agrees either to drive the unit or to provide a driver. Any driver so provided is considered under the agreement as the employee of the contractor, and the contractor is responsible for hiring, firing, directing, training, and paying the driver. The contractor also sets wages, hours, and working conditions, adjusts grievances, withholds taxes and social security, and pays for unemployment and workers' compensation insurance premiums. These drivers, however, like all drivers, must complete the application process set forth above. The Employer will reject any driver, provided by a contractor, who does not complete the process.

The contractor also agrees, *inter alia*, to comply with all laws and regulations regarding the qualification of drivers, the driving of motor vehicles, the condition of the truck, and the nature of the equip-

vehicle or leaving the scene of an accident which resulted in personal injury or death.

[6] The Employer's requirement that drivers report all accidents exceeds the Federal regulations which dictate that only accidents which result in death, serious bodily injury, or property damage in excess of $2,000 be reported.

[7] 49 CFR Sec. 1057 requires that a motor carrier leasing equipment execute a written lease which provides for exclusive possession, control, and use of the equipment for a specified duration of at least 30 days. The lease must also detail, *inter alia*, the amount of compensation and timing of the payment, which party shall pay various expenses such as fuel, taxes, licenses, and tolls, and the parties' respective responsibilities with regard to providing insurance coverage.

[8] Although the Employer maintains that its contractors are not required to haul exclusively for it, the agreement expressly provides that the contractor will not furnish the leased vehicle and equipment to any other motor carrier or other person during the term of the agreement.

ment on it;[9] pay all fines, taxes, and costs of maintenance and operation of the vehicle; furnish all licenses and permits; assume liability for loss or damage to the vehicle under most circumstances and for cargo damage resulting from an accident or the driver's negligence; arrange for liability insurance for time periods when the equipment is not operated for the Employer; timely submit all collections, papers, logs, and other data; assume the risk of death or injury to the contractor; and inform the Employer of all accidents. The agreement also calls for the contractor to make a cash deposit with the Employer for each unit leased, although it does not appear that this provision is enforced. The Employer agrees to provide public liability, property damage, and cargo insurance for periods when the vehicle is being driven for the Employer, and to pay the contractor 75 percent of the gross transportation revenues each Friday for the week's hauls.[10]

The agreement allows a driver to trip lease[11] if the Employer is unable to provide a back haul (return load) for the driver, and if the load trip leased has a destination within a 50-mile radius of the driver's home terminal point. In addition, the Employer receives 5 percent of the gross transportation revenues generated from the trip lease. Thus, these trip leasing provisions give the Employer the rights (1) to control the circumstances under which the contractor may trip lease, and (2) to benefit financially from the trip lease. These rights are not required by Federal regulations.

The intent of the parties, as stated in the agreement, is to create an independent contractor relationship between the contractor and the Employer, rather than an employee-employer relationship. The term of the agreement is essentially indefinite, with the lease running until the end of the calendar year in which it is signed, and then from year to year so long as it is not terminated by one of the parties. Either party may terminate the contract upon 30 days' notice. The Employer estimated that the average length of a contractual arrangement is between 8 months and 1 year. It appears from the record that some of the Employer's drivers have driven for it for many years.

In practice, the relationship between the Employer and its contractors may differ from that set forth in the contractor's agreement. For example, the Employer obtains the various permits necessary for operating in each State and provides a permit book with its name printed on it. The Employer presented testimony that all permit fees are paid by the contractors. However, one driver testified that he had never paid for his permits, and that when the Employer tried to get him to begin such payments, he refused. In addition, Renner testified that the Employer paid for all state permits except those for Texas. Also, although the agreement provides that all fines resulting from the operation of the vehicle are to be paid by the contractor, the Employer pays traffic fines imposed due to its failure to obtain the proper permits.

The Employer's practice with respect to trip leasing is not clearly established in the record. The Employer asserts that, notwithstanding the provisions of its contractor's agreement, it places no restrictions on its contractors' trip leasing. It estimates that its drivers contract for 90 percent of their own back hauls and that 50 percent of the trip leases entered into by its contractors occur without the Employer's permission, knowledge, or receipt of the 5-percent share of the revenue. In July 1978, however, the Employer sent a letter addressed to all its drivers indicating, *inter alia*, that they were not to trip lease without permission from one of its agents and that they could only trip lease to a destination which would allow the Employer to load the driver on the next run.[12] Several drivers testified that it was their understanding that they needed the Employer's permission to trip lease. One driver reported that he had been reprimanded orally for trip leasing without the Employer's permission. Renner also testified that she had overheard an agent of the Employer inform a driver that if Operations Manager Bryan knew the driver had trip leased away from a Rediehs area, the driver would be terminated.

[9] The Employer asserts that it has no contractual right to reprimand drivers for noncompliance with the DOT regulations. The agreement, however, clearly gives the Employer the right to terminate the agreement in the event of a breach, including a breach of the provision requiring contractors to follow the regulations.

[10] The Employer presented testimony that it frequently must negotiate higher rates with the drivers to persuade them to accept partial loads or loads destined for undesirable locations. Two of the drivers, however, testified that they had been required to haul loads to undesirable areas and that any higher rates paid to them on certain loads resulted from their receiving 75 percent of a higher charge to the shipper rather than an increase in the percentage of the gross revenue received by the driver.

An Employer witness also testified that the Employer consults with its drivers during the process of setting its rates.

[11] Under 49 CFR Sec. 1057.22, an authorized carrier which owns or permanently leases equipment may "trip lease," i.e., lease it for one trip only, to another authorized carrier for transportation in the direction of a point which the lessor is authorized to serve.

[12] The Employer's operations manager, Bryan, admitted sending such a letter detailing rules for drivers. He stated that the letter was sent only to drivers associated with the Teamsters, in a move to counter demands by those drivers. Bryan also asserted that soon after the letter was sent the Employer's president, Rediehs, told Bryan that it was not the Employer's policy to have such rules and that the rules should not be enforced. As indicated above, however, the letter was addressed to all drivers, and it appears from the record that it was not subsequently rescinded in writing. Moreover, two drivers, both members of the Teamsters at the time the letter was sent, testified that they received the rules letter, and, as it had never been rescinded to their knowledge assumed it was the Employer's policy.

The Employer has a fuel charge account at a Lake Station truckstop which it allows its drivers to use. It also provides cash advances to drivers prior to long-haul trips. Both fuel charges and advances are deducted, without interest charges, from the driver's settlement checks. The Employer carries workers' compensation insurance for all its drivers, and makes available a medical insurance plan for them, for which it pays about 75 percent of the cost. On occasion, the Employer has loaned money to operators to help them pay for their annual vehicle licenses.

The Employer assumes the risk of nonpayment by the shipper. In fact, in most cases, the drivers are paid for their hauls even before the shipper's payments are due the Employer. If a load is stolen, the Employer, not the driver, is liable to the shipper.

The Employer estimates that between 25–40 percent of its loads are initially rejected, and asserts that it does not penalize drivers who refuse loads. The drivers, on the other hand, testified that if they refused loads, they would be moved to the bottom of the "board," which lists the drivers in the order they have called in their availability for that day, or that they subsequently would be offered less desirable loads. The Employer also contends that it has no rules requiring its drivers to call in or report to its office every day. Its July 1978 letter to all drivers, however, established such a rule, and two of the drivers who testified reported receiving oral reprimands for failure to call in regularly. Operating Manager Bryan testified that he will often try to coordinate pickup times for the mutual convenience of the driver and the shipper. The drivers, however, indicated that the Employer simply directed them to pick up a load at a particular time. Although the Employer contends that it does not require its drivers to make a certain number of hauls per week, its July 1978 letter established a rule requiring that the drivers haul at least one per week. The Employer does not ordinarily specify delivery times, but if a shipper wants a load delivered as soon as possible or at a particular time, the Employer will charge a higher rate for this service and the driver will receive 75 percent of the higher rate. The Employer does not require that the drivers drive a certain number of hours or miles per day.

The Employer provides no bonuses, profit sharing, pensions, unemployment compensation premiums, vacation or holiday pay, nor does it pay for meals or lodging. It does not withhold any taxes or social security from the drivers' settlement checks.[13] The Employer holds no long-term legal interest, beyond the leases, in the contractors' trucks.[14] It does not provide repair or parking facilities, safety awards, credit cards, uniforms, tools, or training.[15]

The contractors purchase their $60,000 tractor/trailer units with no assistance from the Employer, and they may own their trucks as individuals, in partnerships, or as corporations. The long-haul drivers may make up to 50 percent of their income from their back hauls, which frequently are trip leased from other motor carriers. The Employer may not sublease the equipment it leases without the owner's permission. Some contractors have painted the Employer's name on their trucks, while others only use temporary paper signs. The drivers select the particular highway routes they use.[16] Some drivers arrange for loads directly from the Employer's shippers.

It is well established that the Board and the courts should apply common law agency principles in determining whether individuals are employees or independent contractors under the National Labor Relations Act. *N.L.R.B.* v. *United Insurance Company of America*, 390 U.S. 254 (1968). Under the common law right-to-control test, individuals are deemed employees when the employer reserves not only the right to control the ends to be achieved, but also the means to be used in achieving those ends. However, where the right to control is merely limited to the result to be accomplished, an independent-contractor relationship exists. In making this determination, we are mindful that "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[17] The Restatement (Second) of Agency also

[13] There is some evidence that the Employer will allow a garnishment to be attached to a driver's settlement check.

[14] The record contains references, however, to one incident where the Employer held the title to a contractor's trailer as collateral for a short-term loan.

[15] The Employer, in the past, has had a slightly different relationship with a group of 9 to 10 drivers, represented by Teamsters Local 142, who engaged in local or short hauls and usually did not trip lease. The Employer paid these drivers separately for their wages and equipment lease, and deducted taxes, union dues, and medical insurance premiums from their wages. The most recent collective-bargaining agreement between Local 142 and the Employer expired March 31, 1979, and since that date the Employer has treated all of its drivers in the same manner.

[16] The only exception to this general practice is that the Employer will sometimes direct that a load be driven over a particular route due to an "interline" agreement, i.e., a contract between another carrier and the Employer which allows the Employer to utilize the other's authority on a single-trip basis. Such agreements are used when the Employer's authority is not sufficient to complete the haul.

[17] *N.L.R.B.* v. *United Insurance Company of America*, *supra* at 258.

indicates a number of factors which should be considered.[18]

After carefully reviewing the entire record, we conclude that the owner-operators and drivers sought by the Petitioner are employees of the Employer.[19] This conclusion is based on evidence of the Employer's right to and its actual control of the "manner and means" by which the drivers transport goods for the Employer, as well as evidence relating to the other indicia of employee or independent-contractor status set forth in the Restatement.

Through its enforcement of regulations promulgated by Federal and state agencies, the Employer controls many details of the drivers' conduct while they are driving for the Employer. Thus, the Employer has a duty to control, *inter alia*, the level of lawful driving, as measured by the number and type of traffic citations, the driver's physical condition while driving, the number of persons carried and their location in the vehicle, whether the driver operates the vehicle in gear or not, the maximum number of hours of work per day and week, the timing and frequency of load and vehicle inspections during the trip, the use of red flags, the wearing of corrective lenses and/or hearing aids, the speed at which rail crossings are approached, the proper use of turn signals, seat belts, and lights and specified procedures for emergencies and accidents. In addition, the Employer regularly inspects its drivers' trucks to assure itself that the vehicles meet very detailed specifications.

In evaluating the extent of daily supervision, we have considered the nature of the drivers' work. Obviously, the Employer cannot supervise the drivers on the basis of personal observation because the drivers are away from the Employer's premises while they work. This freedom from daily observation, however, does not mean that the Employer does not effectively supervise them through the rules enforcement mechanisms noted above.

The fact that the Employer is required by Government regulations to control the means and manner in which the drivers perform the Employer's hauling does not diminish the validity of our findings. The actual relationship between the Employer and its drivers, rather than the reasons for the relationship, is the critical consideration. *Mitchell Bros. Truck Lines*, 249 NLRB 476 (1980), and *Robbins Motor Transportation, Incorporated*, 225 NLRB 761 (1975). We note that in certain earlier decisions, the Board held that because Federal regulations are imposed on the parties by governmental fiat, they are insufficient by themselves to establish employee status. However, the Board, in *Mitchell Bros. Truck Lines*, noted that these earlier cases were implicitly overruled in *Robbins Motor Transportation, Inc.*

Further, it is clear that the Employer either controls or retains the right to control the drivers to an extent beyond that required by the Federal regulations. Thus, the Employer insists that the drivers report all accidents rather than only serious ones. Also, although the Employer contends it does not enforce its contractual trip leasing limitations, there is no doubt that it retains for itself the *right* to control its drivers' trip leasing, and it is noteworthy that the Federal regulations do not obligate the Employer to place any restrictions on trip leasing at all. We also rely, in finding the drivers to be employees, on the other less direct Restatement indicia set forth above. We note in this regard that the Employer's only business is the hauling of goods in interstate commerce and the only work the drivers perform for the Employer is to haul those goods. Thus, the Employer and the drivers are engaged in an identical, rather than a distinct, occupation, which is the business of the Employer. The fact that the drivers may have other employment or that the drivers engage in a significant amount of trip leasing on their back hauls does not affect our decision here. A worker is not required to work only at one place in order to be considered an employee under the Act. In addition, it is clear that the drivers haul nearly all of their front hauls for the Employer and obtain back hauls either from the Employer or on a trip lease basis from various other motor carriers. Thus, the drivers primarily drive for the Employer. The Employer pays part of the cost of the drivers' medical insurance premi-

[18] The Restatement (Second) of Agency, § 220 (2) (1958) sets forth the following factors which, among others, are considered in determining whether an individual is an employee or an independent contractor:

(a) the extent of control which, by the agreement the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the [worker] supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

[19] We recognize that there are some differences between the owner-operators and the drivers of trucks permanently leased to the Employer by single-unit lessors. For example, there are aspects of the relationship between single-unit lessors and the drivers which indicate that these lessors may be dual employers of the drivers along with the Employer. The nature of the Employer's control over the means and manner of the drivers' work, however, is essentially the same as it is for owner-operators. For this reason, we find that both groups of individuals are employees of the Employer.

ums. Finally, the term of employment is essentially indefinite or "at will," lasting as long as both parties agree to continue it.

There are some factors which arguably might support a finding that the owner-operators are independent contractors. The owner-operators do have a degree of entrepreneurial risk in and control over their work. They purchase their trucks, pay their operating expenses, and may decorate their units as they wish. They decide when to haul and, within the limits enforced by the Employer, how many hours to drive. To some extent, at least, they may refuse loads which they deem undesirable. They are paid by the job, rather than by the hour, have no taxes or social security deducted from their checks, and receive few, if any, employee benefits, except for medical insurance.[20] Further, they appear to have considerable actual freedom under the Employer's current policy to trip lease on their back hauls. Thus, they can affect their profit or loss by varying the amount and timing of their driving and by minimizing operating expenses, repairs, and downtime through careful driving and regular maintenance. In addition, the Employer, through its agreement, has attempted to define its drivers as independent contractors.

These factors, however, do not compel a finding that the drivers are independent contractors. Although the drivers buy and maintain their trucks, they must do so according to the standards enforced by the Employer. While they are paid by the job, the contractual rate paid is set unilaterally by the Employer. In addition, the Employer assumes the risk of nonpayment by customers and carries liability and cargo insurance. The Employer arranges for state and Federal permits and handles the bookkeeping for all hauls without an overhead charge to the drivers. The drivers are allowed to charge fuel at the Lake Station truckstop and are given cash advances prior to beginning a trip. Finally, their entrepreneurial discretion is limited considerably by the rules enforced by the Employer, and their risk is minimized by the Employer's ultimate responsibility for the business and by the services it provides the drivers.

For all of the above reasons, we conclude that the owner-operators and drivers sought by the Petitioner are employees of the Employer. In so concluding, as we stated previously in *Mitchell Bros., supra*, we are mindful that some courts of appeals have disagreed with our prior decisions finding certain truck and cab drivers to be employees within the meaning of the Act.[21] This disagreement generally has centered on the weight to be given Federal regulations in determining an employer's right to control its drivers.[22] Most circuit courts have affirmed our approach to the extent of finding that the control mandated by such regulations is a factor to be weighed.[23] In addition, in several discussions the circuit courts have agreed that the Federal regulations are an extremely important, if not determinative, factor in finding such drivers to be employees. Thus, as the Fifth Circuit noted in *N.L.R.B.* v. *Deaton, Inc.*:

> The regulations . . . have the effect of requiring the holder of a certificate of public convenience and necessity to possess and exercise considerable control over all trucks operated under the certificate, without regard to whether the holder owns the trucks. Control over trucks involves control over drivers. [502 F.2d at 1224–25.]

In *Deaton*, the court affirmed our finding of employee status based on Federal regulations and certain limited "additional controls" voluntarily reserved by the employer. In finding the owner-operators and drivers to be employees, we point out that we do so not only on the basis of the Federal regulations, but also in light of the additional controls retained by the Employer and the other factors noted in the Restatement.

Accordingly, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All single unit owner-operators and drivers of permanently leased trucks employed by the Employer; but excluding multiple unit owner-

[20] Member Jenkins does not regard the factors mentioned in this sentence as significant, since their presence or absence can be controlled at the pleasure of the Employer.

[21] See, e.g., *N.L.R.B.* v. *A. Duie Pyle, Inc.*, 606 F.2d 379 (3d Cir. 1979); *Yellow Cab Company and Checker Cab Company* v. *N.L.R.B.*, 603 F.2d 862 (D.C. Cir. 1978); and *Merchants Home Delivery Service, Inc.* v. *N.L.R.B.*, 580 F.2d 966 (9th Cir. 1978). But cf. *Aetna Freight Lines, Inc.* v. *N.L.R.B.*, 520 F.2d 928 (6th Cir. 1975); *N.L.R.B.* v. *Deaton, Inc.*, 502 F.2d 1221 (5th Cir. 1975); *N.L.R.B.* v. *Pony Trucking, Inc.*, 486 F.2d 1039 (6th Cir. 1973), and *Ace Doran Hauling & Rigging Company* v. *N.L.R.B.*, 462 F.2d 190 (6th Cir. 1972).

[22] Another area of disagreement relates to the relevance in these cases of the Supreme Court's decision in *United States* v. *Silk*, 331 U.S. 704 (1947). Two circuits have held that *Silk* mandates a finding that truckdrivers similar to those herein are independent contractors. See *Merchants Home Delivery Service, Inc.* v. *N.L.R.B., supra*, and *National Van Lines, Inc.* v. *N.L.R.B.*, 273 F.2d 402 (7th Cir. 1960). Another has found it at least supportive of such a conclusion. See *N.L.R.B.* v. *A. Duie Pyle, Inc., supra*. In our view, *Silk* is inapplicable to the present case because it interpreted the Social Security Act rather than the National Labor Relations Act, and because our decision herein is based on the Supreme Court's more recent elucidation, in *N.L.R.B.* v. *United Insurance Company of America, supra*, of the factors to be considered in determining whether a person is an employee or an independent contractor within the the meaning of the National Labor Relations Act.

[23] The D.C. Circuit, in *Yellow Cab Company, supra*, took the position that these regulations do not support a finding of control.

operators, trip lease drivers, office employees, professional employees, guards and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]